Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

R.J. REYNOLDS TOBACCO COMPANY,
PHILIP MORRIS INCORPORATED,
BROWN & WILLIAMSON TOBACCO CORPORATION,
LIGGETT GROUP, INC.,
LORILLARD TOBACCO COMPANY,
THE COUNCIL FOR TOBACCO
RESEARCH - U.S.A., INC.,
AND THE TOBACCO INSTITUTE, INC.
Petitioners,

v.

THE STATE OF MINNESOTA,
BY HUBERT H. HUMPHREY, III,
ITS ATTORNEY GENERAL,
AND BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota and the Court of Appeals of Minnesota

PETITIONERS' REPLY BRIEF

ROBERT F. MCDERMOTT, JR.
(Counsel of Record)
DONALD B. AYER
BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for R.J. Reynolds Tobacco Company and for all petitioners

Of Counsel:

MARK B. HELM
MUNGER, TOLLES & OLSON
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

THOMAS E. SILFEN
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
Counsel for Philip Morris Incorporated

RICHARD A. SCHNEIDER
KING & SPALDING
191 Peachtree Street, N.E.
Atlanta, GA 30303
Counsel for Brown & Williamson Tobacco Corporation

MARY T. YELENICK
CHADBOURNE & PARKE
30 Rockefeller Plaza
New York, NY 10112
Counsel for Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company

GENE E. VOIGHTS
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Counsel for Lorillard Tobacco Company

JAMES P. MCCARTHY
LINDQUIST & VENNUM
4200 IDS Center
80 South 8th Street
Minneapolis, Minnesota 55402
Counsel for Liggett Group, Inc.

STEVEN KLUGMAN
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
Counsel for The Council for Tobacco Research — U.S.A., Inc.

JOHN VANDERSTAR
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Counsel for The Tobacco Institute, Inc.

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REPLY BRIEF

Respondents' several efforts to minimize the significance and need for this Court's review of the decision of the Minnesota courts are unpersuasive. Their principal argument, Brief in Opp. ("Opp.") at 6-12, is that the decision below arises from a discovery dispute that was resolved by an *ad hoc* and fact-specific balancing of particular factors, and thus could not possibly be of interest to this Court:

> The court calculated the burden caused by Petitioners' massive anticipated document production, the burden posed by requiring Respondents to create new and separate identifying information, and whether there was an equivalent substitute for the objective content of the indices.

Opp. at 5.

This accurate characterization of the decision below — which rested entirely on the cost and inconvenience placed on respondents by requiring them to create their own litigation support tools — aptly demonstrates why the decision demands the review of this Court. That review would focus not on the particular balance that the lower courts struck. It would instead focus on whether the very act of balancing under these circumstances offends the core principle of the work product doctrine — that the cost and inconvenience of doing one's own work do not entitle one to share the fruits of an adversary's efforts — and thereby also offends the Due Process Clause, the Taking Clause, or both.

If one thing has been clear since this Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), it is that a party may not litigate its case "either without wits or on wits borrowed from the adversary" — even if it would be much cheaper and easier to do so. *Id.* at 516 (Jackson, J., concurring). Thus, a court does not properly consider abrogating the work product protection based on a balancing of interests where, as here, the moving party seeks nothing more than the benefit of an adversary's hard work. Something more, like the unavailability of evidence except through the review of work product, is required to trigger the balancing that was engaged in by the trial court here.

Respondents have made no showing that there is even a single discoverable fact that will be unavailable to them if they are denied access to the databases, and any such assertion would run counter to common sense. The databases in issue here are non-evidentiary indices of information drawn from documents — lawyers' tools for litigation management and accessing of evidence. The potential evidence itself — the documents from which the databases have been prepared — continues to exist and is subject to disclosure as appropriate in the normal course of discovery.

The issues to be resolved by this Court include whether petitioners' investment of millions of dollars in the databases in reliance on the work product rule gave them a property interest in the confidentiality of the databases, and whether the lower courts so severely altered that rule in the course of this litigation as to deprive petitioners both of property without just compensation, and of due process in the litigation of the case. Petitioners submit that the compelled disclosure of such litigation support tools, without any assertion that information that could be obtained from them is otherwise unavailable, so far departs from the letter and construction of the work product rule as to constitute a violation of the Due Process and Takings Clauses.

While characterizing petitioners' constitutional arguments as "fanciful," Opp. at 13, respondents appear to concede that those same arguments would have substantial merit if, in fact, information of the sort at issue here was, "under *every* circumstance, absolutely protected from discovery by the work product doctrine." Opp. at 8. Respondents argue that if such information is ever held to be discoverable by even one trial court, then petitioners have the "fair warning" required by due process, and thus cannot have any reasonable expectation that the information would be protected against disclosure.

It is, of course, true that any jurisdiction could act prospectively to alter — or eliminate entirely — its work product rule and that once that action were taken, parties acting under the rule as modified could not claim a reasonable expectation that the

old rule would be applied to them. It is also possible that the decision of the Minnesota courts might turn out to be the beginning of such a remaking of the law, if future courts were to adhere to the principle announced below that non-evidentiary litigation databases are disclosable to an adversary simply based on the cost and inconvenience of creating an equivalent.

Respondents are clearly wrong, however, in suggesting that a party's reasonable expectations, and thus its property interest, in the confidentiality of its work product are defeated if some court, somewhere, has previously directed that a similar database be made available to a litigation opponent. The rights to property and to due process in this country are not so fragile as to be upset by the erroneous actions of one or even a handful of courts, where a party is otherwise reasonable in its reliance on an established legal rule. *See Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (property interest exists for due process purposes "if there are such rules or mutually explicit understandings that support [a] claim of entitlement to the benefit"). Even more clearly, respondents are wrong in the assertion that "[c]ourts have historically found that the type of information ordered produced in this case is discoverable." Opp. at 10. The two cases principally relied on by respondents offer no support for that view.

Respondents' artful characterization of *United States v. American Tel. and Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980), Opp. at 10, omits the central fact that the decision reversed a district court order requiring disclosure of a database quite different than the ones at issue here, after rejecting all of that court's reasons for finding the work product protection inapplicable. In remanding for further proceedings with regard to the discoverability of the database — which contained information *not*, as here, from the creator's own documents, but

from those of its adversary[1] — the court came very close to determining with finality that the work product protection barred any disclosure. The court noted that the issue appeared to be resolved by the collateral estoppel effect of another court's decision, but left the final determination of that issue for decision by the trial court. 642 F.2d at 1301-02. Ignoring all of this, respondent focuses only on the court's non-committal comment, in closing, that "it is of course open to the district court to consider the substantial need argument [which had not previously been considered by the district court] if AT&T raises such allegation, and if the district court finds that allegation to be raised in timely fashion." *Id.* at 1302.

The other case principally relied upon by respondents, *United States v. International Business Machines*, 58 F.R.D. 556 (S.D.N.Y. 1973), imposed a sanction for destruction of a computerized database, but left wholly unresolved the question whether the database would have been protected against discovery by the work product rule.[2] Here, too, the database had been prepared by a party based upon documents received in discovery from a litigation adversary, not from its own documents, and the creator of the database had ceased to be a party to the proceeding. Thus, as in *AT&T*, the case in no way required a party to share its own litigation tools with an adversary. Nor did it hint that the work product protection could ever be overcome on the basis that it would be easier for one party to rely on the work of his adversary.

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[1] The Justice Department, in its long-running action against AT&T, sought the benefit of a database prepared in other litigation by a private plaintiff, MCI, based on documents it had received in discovery from AT&T. 642 F.2d at 1289. There was thus no issue of one party securing the litigation tools of an adversary for use against it.

[2] The court stated that "the order which was violated was a preservation order and not a production order. . . . IBM will be given ample opportunity to argue that any or all of these materials are privileged and need not be produced to the Government." 58 F.R.D. at 559.

That point is not advanced either by respondents' contesting of a non-issue before this Court — whether the databases constitute opinion work product. Opp. at 11-12. Petitioners' submission to this Court is that under the rule applicable to ordinary work product, there is no basis on which to compel disclosure or even to engage in a balancing of the hardships of the parties, simply to save one party the cost and effort of doing its own trial preparation. The fact that the decision below allows redaction of certain subjective information does not ameliorate its violation of the ordinary work product rule as it has long been understood, and as it clearly applies to the remaining portions of the databases.[3]

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[3] Three of the cases cited by respondents in connection with their argument concerning opinion work product do not involve any sort of database. *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1015 (1st Cir. 1988) (requiring disclosure of list of documents to be used at deposition pursuant to court's case management powers, where their identity will inevitably be disclosed five days later at the deposition); *In re Shell Oil Refinery*, 125 F.R.D. 132 (E.D. La. 1989) (denying protective order concerning the identity of particular documents selected by a party for copying, on ground that there is no justifiable expectation of confidentiality); *In re Grand Jury Subpoenas*, 959 F.2d 1158, 1167 (2d Cir. 1992) (no opinion work product protection against disclosure of documents, because the large volume involved minimized disclosure of attorney thought processes).

Respondents cite only one very recent case — an unpublished opinion of a state trial judge — where a party was required to disclose to a litigation adversary a database similar to that at issue here. *Scovish v. Upjohn Co.*, No. 526520, 1995 Conn. Super. LEXIS 3288 (Conn. Super. Nov. 22, 1995). This single decision is hardly authority for Respondents' claim that there is "a long history of cases allowing discovery of similar information." Opp. at 9.

As suggested by the discussion of *AT&T* and *IBM*, above, even in the very different circumstance where a party's work product is created not from its own files, but from materials disclosed in discovery from other parties, compulsory disclosure is all but unheard of absent a justification going beyond issues of cost and convenience. The only case known to

Respondents are perhaps farthest off-base when they suggest that the issues presented here are of only "scholarly" or "episodic" interest, and on that ground inappropriate for consideration by this Court. Opp. at 7. One does not require a boatload of appellate decisions on point to appreciate the profound importance of the questions presented here. As we progress into the information age, more and more litigation concerns document- and data-intensive subject matter that cries out for computer-assisted litigation support methods. This decision sends out an unfortunate signal that such work, if potentially useful to an adversary and costly for the adversary to duplicate, becomes a common good to be shared with one's adversary. It thus creates an incentive to refrain from engaging in this work — to "discourage trial preparation and vigorous advocacy," *AT&T*, 642 F.2d at 1300 — the obvious and intolerable consequence that the work product rule was intended to prevent. The greater the information management problem in a species of litigation and the greater the need for the work to be done, so that a party may organize and retrieve its documents more efficiently, the more urgent it becomes to maintain the integrity of the work product rule. The message of this decision, involving very expensive databases referencing many millions of documents in litigation being replicated in federal and state courts across the country, is thus unmistakable and highly disruptive.

Nor is it at all surprising or significant that there are few appellate decisions — indeed few published decisions of any sort

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petitioners where such disclosure was actually ordered involved a manual index of investigative documents prepared by the FDIC, where the requesting parties were defendants in a quasi-criminal FDIC enforcement action against officials of a failed bank. *Washington Bancorporation v. Said*, 145 F.R.D. 274 (D.D.C. 1992); *see Washington Bancorporation v. Said*, 812 F.Supp. 1256, 1260 (D.D.C. 1993) (suit alleged, *inter alia*, breach of fiduciary duty and gross negligence). Some explanation for the court's unusual decision in this instance can perhaps be found in its ultimate disposition of the case in favor of defendants and awarding sanctions against the government. *Id.* at 1275.

— that address the issues raised by this petition. As a general rule, discovery issues are not subject to direct appeal, and thus must proceed to review, if at all, by extraordinary writ. Only in exceptional circumstances — such as those present here — relating to the clarity of the legal error, the size of the investment made in reliance on the rule, and the momentous character of the underlying litigation, can it be expected that such a matter will be considered on the merits at the appellate level. With an investment of many millions of dollars, which was made so that petitioners could effectively defend themselves in nationwide litigation that challenges their very existence, there can be no doubt that this case involves property of great value and constitutional issues of momentous potential consequence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT F. MCDERMOTT, JR.
(Counsel of Record)
DONALD B. AYER
BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for R.J. Reynolds Tobacco Company and for all petitioners

Of Counsel:

MARK B. HELM
MUNGER, TOLLES & OLSON
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

THOMAS E. SILFEN
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
Counsel for Philip Morris Incorporated

RICHARD A. SCHNEIDER
KING & SPALDING
191 Peachtree Street, N.E.
Atlanta, GA 30303
Counsel for Brown & Williamson Tobacco Corporation

MARY T. YELENICK
CHADBOURNE & PARKE
30 ROCKEFELLER PLAZA
NEW YORK, NY 10112
Counsel for Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company

GENE E. VOIGHTS
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Counsel for Lorillard Tobacco Company

JAMES P. MCCARTHY
LINDQUIST & VENNUM
4200 IDS Center
80 South 8th Street
Minneapolis, Minnesota 55402
Counsel for Liggett Group, Inc.

STEVEN KLUGMAN
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
Counsel for The Council for Tobacco Research — U.S.A., Inc.

JOHN VANDERSTAR
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Counsel for The Tobacco Institute, Inc.

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